No. 92-1479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MCDERMOTT, INC.,

Petitioner,

VS.

AMCLYDE, A Division of AMCA International, Inc. and River Don Castings, Ltd.

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Fifth Circuit

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the petitioner has stated any special or important reason for this Court to exercise its judicial discretion given the specific facts of the underlying case and the present uncontroverted state of the law on those issues relevant to this matter.

LIST OF PARTIES

Parties to the proceedings below were the petitioner McDermott, Inc., the respondents AmClyde, a division of AMCA International, Inc. (formerly "Clyde Iron"), River Don Castings, Ltd., and defendants British Ropes, Ltd., International Southwest Slings, Inc., and Hendrik Veder, B.V.

RULE 29.1 LIST

The parent corporation of AmClyde, a division of AMCA International, Inc. (formerly "Clyde Iron"), is United Dominion Industries.

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STATEMENT OF THE CASE

Respondents adopt the statement of the case submitted by the Petitioner with two exceptions:

(a) McDermott did not object to nor seek reconsideration of the proclusion of a contract claim against River Don.

(b) McDermott's statement that "the Fifth Circuit also refused to notice a box full of proffered evidence

of McDermott's Shearleg Crane damages, and denied McDermott its right to present this evidence to a jury." The Fifth Circuit for those reasons stated, infra, acted appropriately.

STATEMENT OF FACTS

Respondents adopt the petitioner's statement of facts with two additions:

(a) Respondents do not believe the evidence established a defect but admit that the jury found that the hook was defective.

(b) Respondents supplied a replacement hook and were never paid for that replacement.

REASONS TO DENY THE WRIT

I. THERE IS NO MATERIAL CONFLICT IN THE CIRCUIT COURTS ON THE EFFECT IN MARITIME LAW OF A PLAINTIFF'S SETTLEMENT WITH LESS THAN ALL DEFENDANTS UPON THE LIABILITY OF NON-SETTLING DEFENDANTS RELEVANT TO THIS MATTER

McDermott's argument that this case is the proper vehicle to resolve its perception that the Circuit Courts are in conflict on the effect in maritime law of a plaintiff's settlement with less than all defendants upon the liability of a non-settling defendant is flawed. The decision of the Fifth Circuit correctly followed the law of the circuit and no case in any other circuit cited by the plaintiff is, in any way, in conflict with it.

In its initial argument, McDermott suggests that the Fifth Circuit applied new law to a settlement and a judgment that had been rendered under some other standard. This is incorrect. The record reflects the

following: *Hernandez v. M/V RAJAAN*, 841 F.2d 582, 591 (5th Cir. 1988) was the law of the Fifth Circuit at the time of settlement and trial; counsel for the non-settling defendants, upon being notified of the settlement, in which his clients did not participate, immediately notified opposing counsel and the Court of his intention to take a *Hernandez* credit; both the Court and plaintiff's counsel recognized *Hernandez* before the trial began (A-4); plaintiff's counsel asked that the issue of settling defendants fault *not* be put to the jury and that certain elements of fault on the part of the settling defendants not be presented to the jury (e.g., failure to warn) (A-2); the trial court recognized *Hernandez* to be the law but refused to give the credit for a reason that was irrelevant according to the Fifth Circuit (Petitioner's A-27); the Fifth Circuit's decision was consistent with its decisions since *Hernandez* in applying the credit (Petitioner's A-27); and McDermott, in its various briefs and arguments for rehearing, never suggested that there was a conflict in the circuits on the issue.

McDermott has stated that the approach taken by the Eleventh and Fifth Circuits is a rejection of *U.S. v. Reliable Transfer Co.*, 421 U.S. 397, 955 S.Ct. 1708, 44 L.Ed.2d 251 (1975) and *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753 61 L.Ed.2d 521 (1979), and suggests that the Fifth Circuit has simply refused to follow this Court's statement of the law. This is obviously not the case.

The "disharmony" in the circuits argued by plaintiffs has nothing to do with this case. The cases cited by plaintiffs do *not* stand for the proposition that a dollar for dollar credit is an inappropriate ap-

proach. Indeed, not one case cited by plaintiffs reject the dollar for dollar credit.[1] Rather, the articles and cases cited are in response to those cases in which a non-settling defendant sought contribution from a settled defendant. There appeared to be some confusion on the surface as to whether an action for contribution would be allowed or whether it would be barred by a good faith settlement or whether the court would simply reduce the amount of the claim by the settling defendant's fault. The circuit courts have held that the latter approach is appropriate.

The holding of the Eleventh and Fifth Circuit is consistent with the Eighth Circuit. The only difference between the Eighth Circuit and the Eleventh and Fifth Circuits is the methodology of reduction. In *Associated Electric Corp. v. Mid American Transportation Co.*, 931 F.2d 1266 8th Cir. 1991, the Eighth Circuit allowed a pro rata reduction for fault determined at trial for a settled defendant. There was no suggestion in that case that the question of a reduction based on the amount of payment was ever at issue.[2] The Fifth and Eleventh Circuits recognized that the risk of a settlement should be placed on the parties entering into the settlement. As a result, they have simply reduced the claim by the amount of the settlement.

Finally, what the Eleventh Circuit did in *Self v. Great Lakes Dredge & Dry Lock Co.*, 832 F.2d 1540 (11th Cir. 1987) and the Fifth Circuit did in *Hernandez* is in line with the philosophy of this Court as espoused in *Reliable Transfer* and *Edmonds*. What is important at the trial between the plaintiff and any remaining defendant is the resolution of each's responsibility for that part of the claim for which plaintiff has not been compensated. Thus, as in this instance, where a plaintiff has sustained $2,400,000 in damages and has already received a $1,000,000 settlement, his remaining damages cannot exceed $1,400,000. The jury must then determine how much of the damages were caused by the defendant in court. This is what was done in this case and the Fifth Circuit's application of *Hernandez* was consistent with the holdings in *Reliable Transfer* and *Edmonds*.

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[1] In Footnote 8, McDermott attempts to cite cases for the proposition that the circuits are in conflict regarding the issue, however, the cases cited do nothing to establish the conflict. In *Joia v. Jo-Ja Service Corp.*, 817 F.2d 908 (1st Cir. 1987), the court considered a limit of liability action under 46 U.S.C. § 1983. In *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. 218 (S.D.N.Y. 1991), the issue was whether contribution would be allowed between the settling and non-settling tort feasors. In *Dobbins v. Crain Bros. Inc.*, 567 F.2d 559 (3rd Cir. 1977), the court only considered whether there was no right of contribution between a dock owner and a barge owner in Jones Act claim. In *Burden v. U.S.*, 1993 AMC 40 (S.D.W.Va. 1992), the court never considered the determination of apportionment of damages. Likewise, in *Doyle v. U.S.*, 441 F. Supp. 701, (D.S.C. 1977) the court did not consider the pro tanto approach and merely applied a pro rata approach.

[2] Nor was there a "searching consideration to the disarrayed state of the law on this issue, the recommendations of scholarly commentators, and the pragmatic observations of trial court decisions" in determining whether a proportional versus dollar-for-dollar reduction would take place as plaintiff's Petition implies at page 14. The issue was *never* mentioned.

II. THE FIFTH CIRCUIT PROPERLY APPLIED NEW YORK CONTRACT LAW WITH RESPECT TO PETITIONER'S CLAIM AGAINST AMCLYDE AND EAST RIVER WITH RESPECT TO PETITIONER'S CLAIM AGAINST RIVER DON.

McDermott's suggestion that the Fifth Circuit failed to follow this Court's ruling in *East River SS. Corp. v. Transparence Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed. 2d 865 (1986) is both factually and legally wrong.

McDermott attacks the ruling of the Fifth Circuit in which McDermott's claim against AmClyde was limited to the remedy afforded under the contract. A casual reading of its writ application would lead the reader to believe that the Fifth Circuit's ruling limiting the recovery was in some way related to an *East River* argument. This is not the case. The Fifth Circuit properly analyzed the contract (III and IV of its Opinion) (Petitioner's A-7 - A-18) and found that as a matter of New York law (the law both parties agreed controlled the contract between the parties), McDermott's recovery was limited. After the Court carefully reviewed the contract, New York law, the pleadings, and testimony, it determined as a matter of law that McDermott's recovery was limited to that for which it bargained—a limited repair warranty.

With respect to the tort claim, it was not necessary for the Court to analyze *East River* because, as the Court pointed out, Article XV of the McDermott-AmClyde Contract provided that "correction of a nonconformance in the manner provided above, shall constitute fulfillment of all liabilities of the seller to the buyer or any other person *whether based upon Contract, tort, strict liability or otherwise*" (emphasis added by the United States Court of Appeals for the

Fifth Circuit). The Court held that this language protected AmClyde from any liability in tort. (Petitioner's A-18).

McDermott's challenge to the Fifth Circuit's ruling with respect to *East River* is thus limited to the claim against River Don. This challenge again is both factually and legally flawed.

McDermott has never asserted that the crane was other property and is thus subject to any exclusion to the *East River* doctrine. Rather, its position is that if there is damage to any other property, this eviscerates the holding in *East River*. This is without merit.

It is important to put this matter in the same perspective as that which both the trial court and the Court of Appeals enjoyed. River Don had previously argued that the damage to the deck for which the Fifth Circuit allowed recovery was not other property as contemplated by this Court in *East River*. It was owned by the same entity and the shear leg crane was specifically designed to be used in the picking up the deck. The Fifth Circuit rejected that argument and held that it did constitute other property.[3] Thus, McDermott was allowed to proceed in its claim for damages to the deck.

The proposition put forth by McDermott that damage to other property opens the defendant to responsibility for the entire loss was specifically rejected by the Fifth Circuit. Importantly, McDermott has not

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[3] While respondents believe that the deck did not constitute other property as suggested by this Court in *East River*, Respondents have not sought review of the Appellate Court's decision.

been able to cite to this Honorable Court one case in either a state or federal court to support its thesis. Rather, it attempts to take the fact that *East River* acknowledged the availability of a product liability claim for other property and personal injury and boot strap it into a claim on the property itself. The reason no such case exists is because McDermott has failed to understand the basis philosophy of *East River*. Risk is a function of commerce. Society allocates risk in allowing claims under tort where the parties would not otherwise be in a position to do so. Thus, there can be a claim for personal injury or damage to other property. However, where entities of relatively equal bargaining power are engaged in commerce, these entities uniquely have the ability to allocate the risk between them. Where no specific arrangement is made, then each party bears its own risk. It is not the place of the court to allocate risk in a commercial maritime setting.

III. THE FIFTH CIRCUIT PROPERLY HELD THAT MCDERMOTT DID NOT PRESERVE A WARRANTY CLAIM AGAINST RIVER DON.

McDermott did not preserve its claim to a warranty recovery from River Don for damage to the crane. In an effort to establish that it did so, McDermott points to instances where the alleged amount of damage to the crane was preserved. The issue of the damage to the crane would have been necessary only if there had been a decision that the *East River* decision of the trial court (subsequently upheld by the Fifth Circuit) was erroneous and the plaintiff has been allowed to proceed for damages *under tort law* for damages to the crane.

The Court of Appeals recognized Petitioner's flawed argument in its opinion in quoting McDermott that "it was not allowed to proceed in contract" but McDermott further stated that "the evidence addressed at trial demonstrated that River Don made express and implied warranties." (Petitioner's A 18-19) McDermott *never* preserved a contractual claim against River Don. It neither sought nor objected to the failure to include a jury interrogatory on the issue of any perceived contractual responsibility on the part of River Don. No aspect of the record cited to this Court or in the underlying record reflects such a claim. To the contrary, McDermott's position at trial was that *no* contractual claim existed:

[P. 59] Mr. Lea [McDermott's counsel]: We maintain that River Don does not get benefit of *East River* because we don't have any contractual relationship with them. That's different now than Clyde. "(Petitioner's A-40).

McDermott determined it had no contractual claim. Because it knew there was no right, it took no step to preserve one.

CONCLUSION

This Honorable Court should deny the Application for Writ of Certiorari. Petitioner has not submitted any issue that meets the criteria of special and important reasons for the granting of the writ as described in Rule 10 of this Honorable Court's Rules. Petitioner has, however, attempted to create arguments that would suggest a conflict in the circuit courts and has suggested that the United States Court of Appeal for the Fifth Circuit has so far departed from the accepted and usual course of judicial pro-

ceeding so as to require this Court to utilize its decretion to cure these problems. The current state of the law and the underlying record reflects that petitioner's arguments are completely without merit.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CASE NO. CA-H-88-2429

McDERMOTT, INC.

VERSUS

CLYDE IRON, RIVER DON CASTINGS LIMITED, BRITISH ROPES LIMITED, INTERNATIONAL SOUTHWEST SLINGS INCORPORATED, HENDRIX VEDER, B.V., McDERMOTT MARINE CONTRACTORS INCORPORATED, HUDSON ENGINEERING, INC.

HOUSTON, TEXAS

NOVEMBER 29, 1990

9:04 A.M. TO 12:30 P.M.

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FILED

APR 19 1991

Jesse E. Clark, Clerk

TRIAL

BEFORE THE HON. GEORGE KELT, UNITED STATES MAGISTRATE

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of fault, then we should have the right to prove that—his percentage of fault. Go ahead, Mr. Lea.

MR. LEA: I think he's intermixing apples and oranges here. Judge—

THE COURT: Splice and things.

MR. LEA: Yes, splicing them together and not unravelling them. But what the—Your Honor, the real question is: you can be negligent all day, but you're only responsible for the damage your negligence cause absent an allegation of punitive damage which nobody's made here. You're negligent. You're negligent. You're responsible for the result of your action. He's trying to go back and prove something he doesn't have to prove; that is, we had knowledge of something and to the extent the slings caused the accident, to that extent, we're responsible. We're acknowledging, and you charge is sling. You're only responsible for the damage you do, and to the extent the slings caused damage, to that extent because of McDermott and the sling manufacturer's settlement, we bear the responsibility. You don't have to go prove something because what they prove can only lead to a finding of responsibility, and you're only responsible for the direct consequences of your own act, and we've already said, we're responsible for the slings, any part they played in it. Thank you.

MR. COUHIG: Your Honor—

MR. O'BRIEN: We don't want to beat a dead horse, Your

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MR. MOSELEY: We stipulated, he doesn't.

MR. COUHIG: I don't think as a cor—as a—I am very concerned and I don't want to get into the big brouhaha again as to how this effects, for example, I'm entitled to my *Hernandez* I believe credit for the fault of—or for the settlement.

THE COURT: Well—

MR. LEA: That doesn't effect it.

THE COURT: That doesn't effect this and that's going to be somewhere down the line. You're going to have a tough time with that since they have—that *Hernandez*, as I read it and perhaps I'm wrong, as I understand that of course is to prevent double recovery for anything.

MR. COUHIG: That's correct.

THE COURT: In other words, you can't get—

MR. COUHIG: He can't get 3.5 million dollars. He could get 2.5 million dollars.

THE COURT: No. That's not what—if—well, all right, you may be right if that's all he was suing for. Say he sued for 2.5 million dollars and he recovered 2.5 million dollars and they had this other million dollars, you're entitled to credit. No question about it under *Hernandez*. But the problem, as I see it from your situation, and I may be wrong, but the problem as I see it from your situation, he's got two million dollars damage to the rig that he ain't going to be able

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